Supreme Court, U.S.
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No. 06-699

In The

Supreme Court of the United States

DAISY ESTELLE COBB,
widow of OLIVER RAY GIBBS,

Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where the United States Court of Appeals for the Fifth Circuit had a duty to review *de novo* the entire record from the United States District Court for the Eastern District of Louisiana and where the United States Court of Appeals for the Fifth Circuit held that petitioner, "Cobb (Mrs. Gibbs) has *not* proved that Gibbs (Mr. Gibbs) made a knowing misrepresentation, namely, that he knew that his estranged wife was still alive.", and, the record *has* clearly proved that Gibbs *did* know that his wife was alive when he fraudulently stated that she was deceased, whether the United States Court of Appeals for the Fifth Circuit failed to properly review de novo the entire record from the United States District Court for the Eastern District of Louisiana.

2. Whether The United States District Court for the Eastern District of Louisiana committed error in refusing to grant plaintiff's Motion For Summary Judgment and the United States Court of Appeals for the Fifth Circuit committed error in vacating the judgment of the United States District Court for the Eastern District of Louisiana and remanding with instruction to dismiss for want of subject matter jurisdiction.

3. Whether the surviving spouse of a participant, in a retirement pension plan governed by ERISA, who would normally have standing, but for the disputed alleged *de facto* election by the participant, continues to have standing, to challenge the alleged *de facto* election of the participant, as a potential beneficiary within the meaning of 29 U.S.C. § 1002(8).

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OPINION BELOW

The United States Court of Appeal for the Fifth Circuit held that it lacked jurisdiction because DAISY ESTELLE COBB, widow of OLIVER RAY GIBBS, lacked standing by not meeting the requirements of beneficiary under *Firestone* and under 29 U.S.C. § 1002(8).

JURISDICTION

The United States Court of Appeals for the Fifth Circuit filed it's decision on August 22, 2006. This court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a Writ Of Certiorari.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1104(a)(1)(A)(i)(ii)(B) and (D)

(1) Subject to sections 1103(c) and(d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their Beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of

an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

29 U.S.C. § 1055 (a)(1)(f)(1)(A)(B)

(a) Required contents for applicable plans

Each pension plan to which this section applies shall provide that

(1) In the case of a vested participant who retires under the plan the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity.

(f) Marriage requirements for plan

(1) Except as provided in paragraph (2), a plan may provide that a qualified joint and survivor annuity . . . will not be provided unless the participant and spouse had been married through the 1-year period ending on the earlier of –

(A) the participant's annuity starting date, or

(B) the date of the participant's death.

29 U.S.C. § 1002(8)

For purposes of this subchapter:

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

29 U.S.C. § 1132(a)(1)(B)

A civil action may be brought –

(1) by a participant or beneficiary –

(B) To recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

29 U.S.C. § 1001(b)

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

STATEMENT OF FACTS

Gibbs was the husband of the Plaintiff-Appellant, Mrs. Gibbs. Gibbs and Mrs. Gibbs were married on July 27, 1937. (See Excerpt No. VI, Page 20, [Exhibit 4, in Doc #17, Part 2, Folder 2 of 2, CS 0089]). They were never divorced. Nor were they ever legally separated. (See Excerpt No. VI, Pages 21, 22, and 23, [Exhibit 4, in Doc #17, Part 2, Folder 2 of 2, CS 0090; CS 0091; CS 0096]). Gibbs died on October 31, 1985 while still married to Mrs. Gibbs. (See Excerpt No. VI, Page 22, [Exhibit 4, in Doc #17, Part 2, Folder 2 of 2, CS 0091]).

Gibbs was a married participant in the Central States, Southeast and Southwest Areas Pension Plan. He was over the age of 55. He had more than twenty years of service. (See Excerpt No. VI, Pages 24-25, [Exhibit 4, in Doc #17, Part 2, Folder 2 of 2, CS 0411-CS 0412]). Therefore, Gibbs was eligible for a Joint and Survivor Pension Benefit ("JSO"). (See Excerpt No. VII, Pages 26-27 [Summary Plan Description ("SPD"), Section 6(b)(ii) at Exhibit 3, in Original Attachments to Doc #21 of C.A. 04-1421 Sec. J, CS 0466-CS 0467]).

Mrs. Gibbs was married to Mr. Gibbs during his entire working life, including when he applied for a retirement pension benefit, when he retired, and when he died. (29 U.S.C. § 1055 (f)(1)(A)(B)).

The Board of Trustees of Central States, as the administrators of this Plan, are the Plan fiduciaries. (See Section 18 in Excerpt No. VII, Page 31 [SPD Section 18 at Exhibit 3, in Original Attachments to Doc #21 of C.A. 04-1421 Sec. J, CS 0477]). Fiduciaries must act solely in the interest of the Plan Participants and beneficiaries and they must exercise prudence in the performance of their Plan duties. (See Section 20(c) in Excerpt No. VII, Page 32 [SPD

Section 20(c) at Exhibit 3, in Original Attachments to Doc #21 of C.A. 04-1421 Sec. J, CS 0480]). 29 U.S.C. § 1104(a)(1).

On August 17, 1979 Gibbs applied for a retirement pension benefit with Central States. (See Excerpt No. VI, Page 16 [Exhibit 4 in Doc #17, Part 2, Folder 2 of 2, CS 0065-CS 0066]). However, Gibbs' application was **fraudulent** and contained **misrepresentation** in that the said Application stated that Gibbs' spouse, Mrs. Gibbs, was deceased. Mrs. Gibbs was not deceased. (See Excerpt No. VI, Page 21 [Exhibit 4, in Doc #17, Part 2, Folder 2 of 2, CS 0090]).

At the time of Gibbs' Application For A Retirement Pension Benefit in 1979, Central States did not require Gibbs to submit documents verifying his marital status, namely, that his spouse was deceased, such as a death certificate. (See Excerpt No. VIII, Page 37 [Defendant's Answer To Supplemental And Amending Complaint By Beneficiary For ERISA Benefits, Page 2, Paragraph 9A from electronic copy of CV 04-1421-J (USCA5 98)]) Central States required nothing. (See Excerpt No. IV, Pages 9-10 [Transcript of Oral Argument, Page 4, Lines 24-25, and Page 5, Lines 1-7 from electronic copy of CV 04-1421-J (USCA5 366-USCA5 367]).

The SPD explicitly provided that a participant was eligible for a JSO if he was married, at least 55 years of age, and eligible to receive a twenty-year service pension benefit (See Excerpt No. VII, Page 26 [SPD Section 6(b)(ii) at Exhibit 3, Exhibit 3, in Original Attachments to Doc #21 of C.A. 04-1421 Sec. J, CS 0467]) **and that a participant would be required to submit documents verifying his marital status.** (See Excerpt

No. VII, Page 28 [SPD Section 6(b)(ii) at Exhibit 3, in Original Attachments to Doc #21 of C.A. 04-1421 Sec. J, CS 0468]). Mr. Gibbs met all of the requirements necessary to be eligible for the JSO.

By letter dated February 4, 1981, from Mrs. Gibbs, Central States was given actual knowledge that misrepresentation had been committed and that Gibbs was married. (See Excerpt No. VI, Page 19, [Exhibit 4, in Doc #17, Part 2, Folder 2 of 2, CS 0070). Now Central States knew that Gibbs was eligible for a JSO. Still Central States did nothing.

Central States did not require Gibbs to submit documents verifying his marital status. (See Excerpt IV, Pages 9-10, [Transcript of Oral Argument, Page 4, Lines 24-25, and Page 5 Lines 1-7]). Even after Central States was given actual knowledge in 1981 by Mrs. Gibbs that the Application of Gibbs for a Retirement Pension Benefit contained misrepresentation and, in fact, Gibbs was married to Mrs. Gibbs, still Central States did nothing.

Mr. Gibbs died on October 31, 1985 and no further benefits were paid by Central States.

By letter dated August 8, 2002, Mrs. Gibbs filed with Central States an Application For A Death Benefit as the surviving spouse of Oliver Ray Gibbs, and, proof that she was never divorced nor legally separated from Oliver Ray Gibbs. [Exhibit 4, in Doc #17, Part 2, Folder 2 of 2, CS 0094-CS 0097]).

By letter dated September 6, 2002 Central States denied the application for Survivor Benefit of Mrs. Gibbs "because he did not elect the joint and 50% Surviving Spouse Option coverage for you at the time he retired in

1979." [Exhibit 4, in Doc #17, Part 2, Folder 2 of 2, CS 0099]).

By letter dated October, 31, 2002, Mrs. Gibbs filed an appeal to the Benefits Claim Review Committee with Central States wherein she appealed the decision dated September 6, 2002 from Central States denying her the surviving spouse benefit. [Exhibit 4, in Doc #17, Part 2, Folder 2 of 2, CS 0103-CS 0116]).

A letter dated April 2, 2003, advised Mrs. Gibbs that the Benefits Claim Appeals Committee determined that Mrs. Gibbs did not "establish that she was eligible for a Joint & Survivor Benefit payable pursuant to the death of Oliver R. Gibbs" because Mr. Gibbs did not choose the Joint & Survivor benefit.

By letter dated September 18, 2003, Mrs. Gibbs filed an appeal to the Board of Trustees of Central States wherein she appealed the decision of the Benefits Claim Appeals Committee dated April 2, 2003.

On December 9, 2003, the Pension Trustee Appellate Review Committee denied Mrs. Gibbs a Joint And Survivor Pension Benefit stating that the communications, acts and omissions by the late Oliver Ray Gibbs, at and around the time of his 1978 [sic] retirement, induced the Pension Fund to rely, and the Pension Fund did, in fact, actually and reasonably rely, upon his intention to reject the JSO.

Mrs. Gibbs appealed this decision in the United States District Court for the Eastern District of Louisiana, but her claim was rejected, so she appealed to the United States Court of Appeals for the Fifth Circuit.

The United States Court of Appeals for the Fifth Circuit vacated the Judgment of the United States District

Court for the Eastern District of Louisiana, and remanded with instruction to dismiss for want of subject matter jurisdiction.

REASONS FOR GRANTING THE PETITION

I. The United States Court of Appeals for the Fifth Circuit failed its duty to review *de novo* the entire record from the United States District Court for the Eastern District of Louisiana when the Fifth Circuit held that petitioner, "Cobb (Mrs. Gibbs) has not proved that Gibbs (Mr. Gibbs) made a knowing misrepresentation, namely, that he knew that his estranged wife was still alive." And the record clearly proves that Gibbs *did* know that his wife was alive when he fraudulently stated that his spouse was deceased.

The United States Court of Appeals for the Fifth Circuit reviews *de novo* the district court's grant of summary judgment using the same standards as the district court. *Urban v. Dolgencorp of Tex., Inc.,* 393 F.3d 572, 573 (5th Cir. 2003).

The Declaration Under Oath by Randy Ray Gibbs, the son of Petitioner, Daisy Estelle Cobb Gibbs, with photographs attached, and the Declaration Under Oath by Eugenia Ketteringham, wife of Randy Ray Gibbs, the daughter-in-law of Petitioner, Daisy Estelle Cobb Gibbs, with photographs attached, in the record, clearly proves that Gibbs did know that his wife was alive when he fraudulently misrepresented that his spouse was deceased. [Exhibit 4, in Doc #17, Part 2, Folder 2 of 2, CS 0165-CS 0171]. It appears that, clearly, the United States Court of

Appeals for the Fifth Circuit did not review *de novo* the entire record from the United States District Court for the Eastern District of Louisiana or the court would have been aware of this proof.

II. The United States District Court for the Eastern District of Louisiana committed error in refusing to grant plaintiff's Motion For Summary Judgment and the United States Court of Appeals for the Fifth Circuit committed error in vacating the judgment of the United States District Court for the Eastern District of Louisiana and remanding with instruction to dismiss for want of subject matter jurisdiction and the Fifth Circuit's decision puts it in conflict with the Third Circuit, the Seventh Circuit, the Ninth Circuit and with relevant decisions of this Court.

Mrs. Gibbs asserted District Court jurisdiction as a beneficiary under Section 502(a) of ERISA, 29 U.S.C. § 1132(a)(1)(B).

The Fifth Circuit held that the issue of whether a particular plaintiff falls within one of the three enumerated classes of litigants, (participants, beneficiaries, or fiduciaries) is a jurisdictional one.

The Fifth Circuit further held that it has "hewed to a *literal construction* of Sec. 1132(a)" on this issue.

Because the issue of standing was one of subject matter jurisdiction, the Fifth Circuit raised it *sua sponte* and directed the parties to submit briefing on the issue. Mrs. Gibbs asserted in her appellate brief and supplemental

briefing that she is a "beneficiary" to whom the plan trustees owe a fiduciary duty.

The Fifth Circuit held that ERISA defines "beneficiary" as "a person *designated* by a participant, **or** by the terms of any employee benefit plan, who is or may become entitled to a benefit thereunder." ERISA § 3(8), 29 U.S.C. § 1002(8) (emphasis added).

In favor of jurisdiction, both the Appellant, Mrs. Gibbs, and the Appellee, Central States, cited a case that involved the definition of "participant," *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 117-18 (1989), which held that "to establish that he or she '*may become eligible' for benefits,* a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Id.* (emphasis added). The parties explained that the definition of beneficiary, like the definition of participant, involved the term "is or may become entitled to a benefit," and, therefore, [Cobb] (Mrs. Gibbs) had standing because she had a "colorable claim" that she may be entitled to benefits. The Fifth Circuit disagreed.

The Fifth Circuit held that this case involves the definition of "beneficiary," and requires colorable entitlement to benefits and additionally requires that the "beneficiary" be "designated" as such by the participant or by the terms of the plan.

The Fifth Circuit further held that post-*Firestone*, it has continued to adhere to a "literal construction" of beneficiary and has refused to read the "designation" requirement out of the statutory definition:

> "A beneficiary must prove **both** a "colorable claim" under *Firestone* **and** a "designation" by the participant or the terms of the plan: A beneficiary is "a person *designated* by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. Section 1002(8) (emphasis added).

The Court stated that Section 1002(8) defines "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, *who is or may become entitled to a benefit* thereunder." (emphasis added). "Therefore, based on the statutory language, a 'beneficiary' is not anyone who claims to be . . . [but] is one who has a reasonable or colorable claim to benefits." *Crawford v. Roane,* 53 F.3d 750, 754 (6th Cir. 1995).

The Fifth Circuit held that under *Coleman v. Champion Int'l Corp.,* 992 F.2d 530, 533 (5th Cir. 1993) Mrs. Gibbs is not a beneficiary. The court further held that Mr. Gibbs never personally "designated" [Cobb] (Mrs. Gibbs) or anyone else as beneficiary of his Plan assets." *Id.* at 533. "[T]herefore, [Cobb's] (Mrs. Gibbs') assertion of beneficiary status rests upon the language and terms contained in the Plan." *Id.*

In its letter brief, Central States, stated that the plan does not define the term "beneficiary." In her letter brief, Mrs. Gibbs also acknowledged that the plan does not specifically define the surviving spouse as a beneficiary. Mrs. Gibbs' argued, however, that the Plan makes provisions under certain circumstances for benefits to be paid to the surviving spouse. Therefore, if the surviving spouse is eligible to receive those benefits from the Plan, and Mrs. Gibbs shows that she is eligible for those benefits, then she must be considered a beneficiary. Mrs. Gibbs, as the

surviving spouse of a participant who was eligible for a JSO, is a person who, by the terms of the employee benefit plan, is or may become entitled to a benefit thereunder. Mrs. Gibbs has a colorable claim that she will prevail in a suit for benefits. *Firestone Tire and Rubber Co. v. Bruch*. Thus, Mrs. Gibbs is a beneficiary.

The Fifth Circuit held that the fact that Mrs. Gibbs is or may become entitled to a benefit does not necessarily prove the separate requirement that she be "designated" as a beneficiary by the terms of the plan.

The Fifth Circuit held that assuming, *arguendo*, that entitled to benefits under the JSO would count as a "designation," Mrs. Gibbs' claim fails for the same reason that the son's claim failed in *Coleman* – the plan plainly provides that if the decedent received the lifetime only benefit, the spouse is *not entitled* to a JSO benefit after his death.

The court then quoted the plan section on "Pre-Retirement and Post-Retirement Benefit to Spouse" as follows:

> [a] Joint and Survivor Pension Benefit (subject to the election and rejection provisions in "Appendix A" of this Plan) shall be payable to a Pensioner upon Retirement (commencing upon his 55th birthday), or the surviving spouse of a Participant upon his death on or after his 55th birthday but before his Retirement, if the Participant was then eligible for immediate payment of a pension benefit in accordance with Article IV, Sections 2, 3 or 4. Upon death of a Pensioner receiving *this* pension benefit, 50% thereof becomes payable to his surviving spouse. . . .

The court stated that if the plan participant dies after retirement, the spouse is eligible for a "post-retirement" benefit only if the Pensioner was receiving "this" pension benefit, that is, the reduced joint and survivor benefit, not the Lifetime Benefit.

The court further stated that Mrs. Gibbs is not "entitled" to any benefit under it, because she does not satisfy one of the eligibility criteria for it: Gibbs was not receiving "this" benefit (*i.e.,* the joint and survivor benefit); he was receiving Lifetime Only benefit.

The court held, therefore, that, as was the case with the son in *Coleman*, the terms of the plan do not afford Mrs. Gibbs beneficiary status. Under the plan, no pension benefits are to be paid to surviving spouses of those who received benefits under the unreduced Lifetime Benefit option.

However, the court misses the point that Mr. Gibbs should have been receiving a JSO rather than a Lifetime Benefit. The court quoted above from the Plan section on "Pre-Retirement and Post-Retirement Benefit to Spouse" but, the court seems to have ignored the language in the above quote referring to "(subject to the election and rejection provisions in "Appendix A" of this Plan)" which election and rejection provisions provide as follows:

> (3) POST-RETIREMENT OPTION. In addition, for each Pensioner eligible for a Joint and Survivor Pension Benefit, there shall be a separate "post-retirement election period" in which the Participant has the right to elect in writing that such benefit will not be payable upon his death after Retirement. Said "post-retirement election period" shall commence on the actual date of Retirement of

> the Pensioner (upon attaining his Twenty-Year Service Retirement Date, his Early Retirement Date or his Normal Retirement) or on the date he is eligible and applies for a Vested Pension Benefit and shall extend until the ***90th day*** after the Pension Fund sends the written notice required by the next sentence. Within 7 days after said "post-retirement election period" commences, or a reasonable time thereafter, the Pension Fund shall send written notice to the Participant informing him of the availability of a Joint and Survivor Pension Benefit and also explaining the terms and conditions of such benefit and the comparative financial effect upon the amount of his pension benefits if he elects in writing that such benefit shall not be payable to his spouse upon his subsequent death. (emphasis added).

Central States provided no written notice to Mr. Gibbs and Mr. Gibbs made no election.

The plan provided under it's **default provisions** that if the participant was qualified for a JSO, as Mr. Gibbs was, because he was married, he was over 55 years of age and he had over 20 years of service, he was required to elect to reject the JSO and, if he did not do so in accordance with the terms of the plan, his benefit would be paid as a JSO.

The court attempted to distinguish *Sladek v. Bell System Management Pension Plan,* 880 F.2d 972, 976-78 (7th Cir. 1989), which was decided before *Coleman*, and the court said that *Sladek* is distinguishable because there the benefit plan itself designated plaintiff, the deceased

participant's spouse, as survivor annuitant, unless the participant elected to receive an unreduced lifetime only benefit. In *Sladek* the participant elected to receive the lifetime only benefit and the surviving spouse argued that the election was voidable because the participant was incompetent to make a decision because of Alzheimer's Disease. The court said that here Mr. Gibbs' *de facto* election of the Lifetime Benefit is not voidable even if he misrepresented that his wife was deceased because Mr. Gibbs retired in 1978 [sic] and he was entitled to select the Lifetime Benefit without the consent of his spouse. The court added a footnote explaining that before 1984 the spouse of a participant was not required to join in a JSO election. *Boggs v. Boggs,* 520 U.S. 833, 843 (1997). The court then concluded that his misrepresentation was harmless and does not render his election voidable.

However, Mr. Gibbs' misrepresentation was not harmless. Mr. Gibbs ***was*** entitled to ***elect*** the Lifetime Benefit without the consent of his spouse. However, Mr. Gibbs ***was required*** to make an ***election***. Mr. Gibbs never made an election of any kind. Mr. Gibbs did ***not*** reject the JSO nor did he ***elect*** the Lifetime Only Benefit. Contrary to the clear terms of the Plan and the SPD, Central States unilaterally awarded Mr. Gibbs a Lifetime Benefit. He was required to elect or to reject the JSO ***first before*** he would become eligible for a Lifetime Benefit. The Plan and the SPD contained explicit and detailed provisions that set forth the procedure whereby Mr. Gibbs was to make an election to reject the JSO, *supra*.

These provisions of the Plan and of the SPD were not complied with.

The provisions of the Plan and of the SPD clearly set forth the terms whereby a participant, such as Mr. Gibbs, was eligible for a JSO. Under those terms, Mr. Gibbs clearly was eligible for a JSO. (See Excerpt No. VII, Pages 26-27 [SPD, Section 6(b)(ii) at Exhibit 3, in Original Attachments to Doc #21 of C.A. 04-1421 Sec. 7, CS 0466-0467]).

The provisions of the Plan and of the SPD clearly set forth that a participant, such as Mr. Gibbs, would be required to verify his marital status. Mr. Gibbs clearly did not verify his marital status and clearly Mr. Gibbs was not required by the Trustees of Central States to verify his marital status. (See Excerpt No. VII, Page 37 [Defendant's Answer To Supplemental And Amending Complaint By Beneficiary For ERISA Benefits, Page 2, Paragraph 9A from electronic copy of CV 04-1421-J (USCA5 98)] (See Excerpt No. IV, Pages 9-10 [Transcript of Oral Argument, Page 4, Lines 24-25, and Page 5, Lines 1-7 from electronic copy of CV 04-1421-J (USCA5 366-USCA5 367]).

The provisions of the Plan and of the SPD clearly set forth the procedures whereby a participant, such as Mr. Gibbs, who was eligible for a JSO, would be required to make an election to reject the JSO and, if the participant, rejected the JSO then he would become eligible for a Lifetime Benefit. Clearly, as the Fifth Circuit found, Mr. Gibbs never made any election whatsoever.

The fact that the Plan contains detailed provisions establishing when a participant is eligible for a JSO, and, how a participant is to be awarded a JSO or a Lifetime Benefit, clearly indicates that these procedures were not intended to be ignored or that another procedure was acceptable.

In 1979, Mr. Gibbs could elect the Lifetime Benefit without the consent of his wife. But, the Trustees could not allow the provisions of the Plan to be ignored. Mr. Gibbs first had to be provided with an election and he had to reject the JSO before he could become eligible for a Lifetime Benefit. He could make this *election* without the consent of his wife, but, he never made an *election*. He simply committed misrepresentation. He said his wife was deceased, and the Trustees awarded him a Lifetime Benefit. Even when the Trustees were informed in 1981 that Mr. Gibbs had clearly committed misrepresentation and that he did have a surviving spouse, the Trustees of the Plan did not adjust his pension benefit even though the Plan said

> "any misrepresentation in any application submitted by a claimant to the Pension Fund, for pension or other benefits, *shall* constitute grounds for *adjustment* of a claim and of the requested benefits, for recovery by the Pension Fund of any benefit payments made in reliance on said misrepresentation, and for any other equitable legal remedies which may be available to the Pension Fund."

There is even strong evidence in the record to indicate that Central States knew in 1979 that Mr. Gibbs had a spouse because his award letter awarding him a lifetime benefit also awarded the "survivor pension to his spouse." (Exhibit 4, CS 0069) If Central States knew that Mr. Gibbs had a spouse, the terms of the Plan required that he be given written notice and that he make an election to reject the JSO before he could receive the Lifetime Benefit. The Fifth Circuit said that Plan's terms provide that in case of a misrepresentation, Central States "may" recover any benefit payments that Gibbs was not entitled to receive,

not that Central States "will" or "must" recover such benefits.

However, the terms of the Plan and of the SPD provide that misrepresentation *"shall"* constitute grounds for *adjustment* of the claim. Even if the Plan were to be silent on misrepresentation, since the election period had closed, and, Mr. Gibbs had made no election to reject the JSO, Central States was required by the default provisions of the Plan and of the SPD to award Mr. Gibbs a JSO.

The Fifth Circuit held that Mrs. Gibbs was never a beneficiary because Mr. Gibbs never received the JSO Post-Retirement Benefit, but only a Lifetime Benefit, which did not entitle Mrs. Gibbs to benefits after Mr. Gibbs' death. However, as set forth above, had Central States followed the terms and provisions of it's own Plan and SPD, Mrs. Gibbs would be a beneficiary.

As set forth in *Sladek v. Bell* this action is brought by Mrs. Gibbs as a potential beneficiary pursuant to 29 U.S.C. § 1132(a)(1)(B) alleging that the Trustees of Central States are the Plan Administrators and the Plan Fiduciaries, and, because of the Trustees malfeasance, Mr. Gibbs was wrongfully awarded a Maximum Lifetime Pension Benefit rather than a JSO.

The Plan presumed that the survivor annuity is selected unless expressly declined and Mrs. Gibbs is entitled to a JSO by reason of the misrepresentation of Mr. Gibbs and his failure to reject the JSO and the failure of the Trustees to properly follow the terms required by the Plan and the SPD. See 29 U.S.C. § 1055(a).

Appellant, Mrs. Gibbs, should have standing as a beneficiary by reason of the misrepresentation of Mr.

Gibbs and his failure to reject the JSO and the failure of the Trustees to properly follow the terms required by the Plan and the SPD and the default terms of the Plan which provided that if Mr. Gibbs did not properly reject the JSO that a JSO would be awarded.

As pointed out in *Sladek* the purposes of ERISA are two fold, to protect interstate commerce and to protect participants and beneficiaries of such plans.

It is . . . to be the policy of this Act to protect . . . the interest of participants in employee benefit plans and their beneficiaries . . . by providing . . . ready access to the Federal courts. 29 U.S.C. § 1001(b). As stated in *Sladek*, "we are not required, and it is not proper for us to give an unduly cramped reading to those provisions granting standing to certain classes of persons under the Act, *i.e.*, participants, beneficiaries, or fiduciaries." 29 U.S.C. § 1132(a)(2).

As stated in *Sladek* ERISA was not designed to protect merely those beneficiaries already receiving benefits, but also "putative" beneficiaries. *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 933 (7th Cir. 1989).

As stated in *Sladek*, the Conference Report on the statute clearly states that "civil actions may be brought by a . . . beneficiary . . . to clarify rights to receive future benefits under the Plan . . . ." H.R. Conf. Rep. No. 93-1280, p. 327 (1974) (quoted in *Pilot Life Ins. Co. v. Dedaux*, 481 U.S. 41, 55, 107 S.Ct. 1549, 1557, 95 L.Ed.2d 39 (1986)) (emphasis added). See generally S. Rep. No. 127, 93d Cong., 1st Sess. (1973), reprinted in 1974 U.S. Code Cong. & Admin. News 4838; H.R. Rep. No. 533, 93d Cong., 1st Sess. (1973), reprinted in 1974 U.S. Code Cong. &

Admin. News 4639; see also *Mutual Life Ins. Co. of N.Y. v. Yampol*, 840 F.2d 421, 425 (7th Cir. 1988); *Thornton v. Evans*, 692 F.2d 1064, 1077 (7th Cir. 1982).

As stated in *Sladek*, by negative implication *Vilas v. Lyons,* 702 F.Supp. 66 (D.Md. 1988) stands for the proposition that the spouse of a plan participant is a beneficiary under ERISA and that, absent a valid waiver or election, the spouse has standing to maintain an action under Sec. 1132(a). See also *Operating Eng'rs Local #428 Pension Trust Fund v. Zambrosky,* 650 F.2d 196, 201 (9th Cir. 1981); *Gilquist v. Becklin*, 675 F.Supp. 1168, 1169 (D.Minn. 1987).

As stated in *Sladek*, "the Third Circuit has taken an even more expansive reading of the standing provisions in ERISA, citing the language of the Ninth Circuit to the effect that "a party has standing to sue . . . if his alleged injury 'fall[s] arguably within the zone of interests protected by the statute allegedly violated, so long as the 'the statute itself does not preclude the suit.'" *Northeast Dept. ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 152 (3d Cir. 1985) (quoting *Fentron Indus. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1304 (9th Cir. 1982)). See also *International Ass'n of Bridge, Structural & Ornamental Iron Workers Local No. 111 v. Douglas*, 646 F.2d 1211 (7th Cir. 1981), cert. denied, 454 U.S. 866, 102 S.Ct. 328, 70 L.Ed.2d 166 (1981); *In re Estate of Sheppard*, 658 F.Supp. 729, 734 n.9 (C.D.Ill. 1987).

As stated in *Sladek*:

> "It seems strange to argue that the reference to "beneficiaries" in Sec. 1002(8) is limited to designated beneficiaries – apparently even if the very

> designation denying one's status as beneficiary is voidable. First, we would simply note that Congress is no less able to utilize the English language than the courts, and if Congress had meant to limit Sec. 1002(8) to designated beneficiaries, it'd need only to have done so. More importantly, we can imagine a situation in which the plan participant is, by all accounts, mad and elects to receive full pension benefits in his fit of madness. We can further imagine a plan review board, whether through personal animus, shear caprice, or simple mistake, denying a petition to have the participant's election set aside. Surely no court would bar such a plaintiff from Federal court because standing was based upon 'assumed evidentiary finding in [plaintiff's] favor.' Perhaps it could be argued that the court's imagination is too vivid and that the situation posed is not the case before this Court, but it is drawing upon the paradigm that the bankruptcy of the competing analysis is exposed. It is simply not reasonable to dismiss the instant complaint on standing grounds. To deny that the instant appellant has standing would be to deny that all potential beneficiaries have standing so long as an election, however invalid, had been made. This, we think, would elevate the making of an election to a ritualistic talisman, and this we are not willing to do."

As stated in *Sladek*, although the appellant was not clearly designated as a beneficiary by her husband, she was a beneficiary under the Plan in the absence of a valid election.

In the instant case, if the appellant were to be successful in proving her allegations, she would become a presumptive beneficiary under the Act.

III. This Court should resolve the split among the circuits as to whether the surviving spouse of a participant, in a retirement pension plan governed by ERISA, who would normally have standing, but for the disputed alleged *de facto* election by the participant, continues to have standing, to challenge the alleged *de facto* election of the participant, as a potential beneficiary within the meaning of 29 U.S.C. § 1002(8).

There is a split of authority among the circuits as to the issue of whether a potential beneficiary under a retirement pension plan governed by ERISA should have standing to sue.

The Third Circuit has taken an expansive reading of the standing provisions in ERISA, citing the language of the Ninth Circuit to the effect that "a party has standing to sue . . . if his alleged injury 'fall[s] arguably within the zone of interests protected by the statute allegedly violated,' so long as 'the statute itself does not preclude the suit.'" *Northeast Dept. ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 152 (3d Cir. 1985) (quoting *Fentron Indus. v. National Shopmen Pension Fund,* 675 F.2d 1300, 1304 (9th Cir. 1982)). See also *International Ass'n of Bridge, Structural & Ornamental Iron Workers Local No. 111 v. Douglas,* 646 F.2d 1211 (7th Cir. 1981), cert. denied, 454 U.S. 866, 102 S.Ct. 328, 70 L.Ed.2d 166 (1981); *In re Estate of Sheppard,* 658 F.Supp. 729, 734 n.9 (C.D.Ill. 1987).

The Seventh Circuit, *Sladek v. Bell System Management Pension Plan,* 880 F.2d 972, 976-78 (7th Cir. 1989), in searching for the appropriate method of analysis, looked to the Ninth Circuit decision in *Allen v. Western Conference of*

Teamsters Pension Trust Fund, 788 F.2d 648 (9th Cir. 1986). The Ninth Circuit held that ERISA beneficiaries are limited to actual spouses and, insofar as the participant's divorce had not become final as of the time of his second marriage, his marriage to the plaintiff was void. As such, the plaintiff was merely a "putative spouse" and lacked standing under the Act. *Id.* at 649-50.

The Seventh Circuit, in *Sladek*, said that what is crucial for our purposes is the fact that, on it's face, the complaint in *Allen* appeared to be a routine claim for benefits by the surviving spouse in her capacity as beneficiary. *Id.* at 649. The Ninth Circuit was willing to pierce the surface of the complaint, however, and examine the validity of the underlying agreement (the marriage) which gave rise to the plaintiff's status as a beneficiary. The *Allen* court held that the agreement, *i.e.*, the marriage, was void and that the plaintiff lacked standing. Id. at 650.

The Seventh Circuit held in *Sladek* that "although the appellant was clearly not designated as a beneficiary by her husband, she was a beneficiary under the Plan in the absence of a valid election.

That is *exactly* the situation in this case.

The Fifth Circuit in *Coleman* rejected the "zone of interest" analysis.

In this present case, the Fifth Circuit held that ERISA defines "beneficiary" as "a person *designated* by a participant, or by the terms of any employee benefit plan, who is or may become entitled to a benefit."

In favor of jurisdiction, both the Appellant, Mrs. Gibbs, and the Appellee, Central States, cited *Firestone Tire & Rubber Co. v. Bruch,* which held that "to establish

that he or she '*may become eligible' for benefits,* a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." (emphasis added). The parties explained that the definition of beneficiary, like the definition of participant, involved the term "is or may become entitled to a benefit," and, therefore, [Cobb] (Mrs. Gibbs) had standing because she had a "colorable claim" that she may be entitled to benefits. The Fifth Circuit disagreed.

The Fifth Circuit further held that post-*Firestone*, it has continued to adhere to a "literal construction" of the three classes of plaintiffs with standing and it has refused to read the "designation" requirement out of the statutory definition:

> "A beneficiary must prove **both** a "colorable claim" under *Firestone* **and** a "designation" by the participant or the terms of the plan: A beneficiary is "a person *designated* by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. Section 1002(8)" (emphasis added).

The Fifth Circuit further held that under *Coleman,* 992 F.2d at 533-34 Mrs. Gibbs is not a beneficiary. Mr. Gibbs never personally "designated" [Cobb] (Mrs. Gibbs) or anyone else as beneficiary of his Plan assets." *Id.* at 533. "[T]herefore, [Cobb's] (Mrs. Gibbs') assertion of beneficiary status rests upon the language and terms contained in the Plan." *Id.*

The Fifth Circuit held that Mrs. Gibbs' claim fails for the same reason that the son's claim failed in *Coleman* – the plan plainly provides that if the decedent received the

lifetime only benefit, the spouse is *not entitled* to a JSO benefit after his death.

The court stated that if the plan participant dies after retirement, the spouse is eligible for a "post-retirement" benefit only if the Pensioner was receiving "this" pension benefit, that is, the reduced joint and survivor benefit, not the Lifetime Benefit.

The court further stated that Mrs. Gibbs is not "entitled" to any benefit under it, because she does not satisfy one of the eligibility criteria for it: Gibbs was not receiving "this" benefit (*i.e.,* the joint and survivor benefit); he was receiving Lifetime Only benefit.

The court held, therefore, that, as was the case with the son in *Coleman*, the terms of the plan do not afford Mrs. Gibbs beneficiary status. Under the plan, no pension benefits are to be paid to surviving spouses of those who received benefits under the unreduced Lifetime Benefit option.

The court said that here Mr. Gibbs' *de facto* election of the Lifetime Benefit is not voidable even if he misrepresented that his wife was deceased because Mr. Gibbs retired in 1978 [sic] and he was entitled to select the Lifetime Benefit without the consent of his spouse. The court added a footnote explaining that before 1984 the spouse of a participant was not required to join in a JSO election. *Boggs v. Boggs,* 520 U.S. 833, 843 (1997). The court then concluded that his misrepresentation was harmless and does not render his election voidable.

However, as the court found, Mr. Gibbs made no election of any kind. Mr. Gibbs was qualified for a JSO. Therefore, he had to elect to reject the JSO before he

would become eligible for a Lifetime Benefit. Since he made no election, under the default provisions of the plan, his benefit must be paid as a JSO.

CONCLUSION

The court should grant the petition of writ of certiorari and reverse the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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461 F.3d 632

In the
United States Court of Appeals
for the Fifth Circuit

No. 05-30906
Summary Calendar

DAISEY ESTELLE COBB,
WIDOW OF OLIVER RAY GIBBS,

Plaintiff-Appellant,

VERSUS

CENTRAL STATES, SOUTHWEST AND
SOUTHEAST AREAS PENSION FUND,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
No 2:04-CV-1421

(Filed Aug. 22, 2006)

Before SMITH, GARZA and PRADO, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Daisy Cobb appeals an adverse benefit determination by Central States, Southwest and Southeast Areas Pension Plan ("Central States"). We vacate the judgment and remand with instruction to dismiss for want of subject matter jurisdiction.

I.

In about August 1979, Oliver Gibbs submitted an "Application for a Retirement Pension Benefit" to Central States stating that he was retiring on October 26, 1979. Central States is a multiemployer pension plan. At the time he submitted his application, Gibbs was married to, but separated for thirteen years from, Cobb. In his pension application, Gibbs represented under oath that his spouse was "deceased." Gibbs died in 1985. In 2002 Cobb submitted a claim for the Joint and Survivor Pension Benefit.

When he retired, Gibbs was eligible to receive an unreduced lifetime pension of $675.00 per month, with no pension benefits after his death (the "Lifetime Benefit"). Central States' Pension Plan also allowed a participant to receive or reject the Joint and Survivor Pension Benefit ("JSO") if he met the three eligibility criteria for this plan. Generally, this benefit provides a reduced pension to the participant, and 50% of the reduced lifetime pension as a lifetime monthly income to his/her spouse after the participant's death.

Gibbs would have received a reduced lifetime pension of $588.60 per month, but only by meeting several conditions, including that he had to be married at the time of his retirement. The plan provided that

> [i]n order to be eligible for this pension benefit, you MUST meet each of the following requirements AT THE TIME OF YOUR RETIREMENT:
>
> – you MUST be married; and
>
> – you MUST be at least age 55; and
>
> – you MUST be eligible to receive a Twenty-Year Service Pension Benefit, an Early Retirement

Pension Benefit or a Vested Pension Benefit from this Plan.

Because Gibbs represented that his spouse was deceased, he did not meet the criteria, so he was never sent an election form for the JSO. He started receiving unreduced lifetime benefits in November 1979. In February 1981 (before Gibbs's death), Cobb contacted Central States and advised it that she was Gibbs's spouse. Cobb stated that she and Gibbs had been separated for "about 15 years" but that they were legally married. Cobb also stated that Gibbs was receiving a pension benefit and that she wanted to receive some of it. Central States informed Cobb that she was not eligible to receive any part of Gibbs's pension because the Pension Plan provided that "[a]ll Pension Benefits provided by this Plan shall be paid directly to the Pensioner, and not to any creditor or other person not eligible for such benefits."

In 2002, Cobb requested benefits from Central States by submitting an Application for Death Benefit. In September, Central States advised Cobb that she was not eligible to receive any benefits because Gibbs did not elect the "Joint and 50% Surviving Spouse Option" when he retired in 1979. Cobb appealed this adverse benefit determination to Central States' Benefits Claim Appeals Committee.

In April 2003, Central States advised her that her appeal was rejected because Gibbs had not elected to have his benefit paid in the JSO form when he retired. Cobb exhausted the administrative appeals process when her appeal was considered by the trustees, who determined that "the communications, acts and omissions by the late Oliver Ray Gibbs, at and around the time of his 1978 [sic]

retirement, induced the Pension Fund to rely, and the Pension Fund did in fact actually and reasonably rely, upon his intention to reject the JSO." Cobb appealed this decision in court, but her claim was rejected, so she appeals.

II.

Cobb asserts district court jurisdiction under section 502(a) of ERISA, 29 U.S.C. 1132(a). That provision, however, limits those who can maintain suit under the statute to "participants," "beneficiaries," or "fiduciaries." *Coleman v. Champion Int'l Corp.*, 992 F.2d 530, 533 (5th Cir. 1993). Because "[w]here Congress has defined the parties who may bring a civil action founded on ERISA, we are loathe [*sic*] to ignore the legislature's specificity," standing to bring an action founded on ERISA is a "jurisdictional" matter.[1]

Accordingly, the issue of whether a particular plaintiff falls within one of the three enumerated classes of litigants (participants, beneficiaries or fiduciaries) is a jurisdictional one. *Hermann,* 845 F.2d at 1289. This court has "hewed to a *literal construction* of § 1132(a)" on this issue. *Id.* (emphasis added).

Because the issue of standing is one of subject matter jurisdiction, we raised it *sua sponte* and directed the parties to submit briefing on the issue. Although the basis

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[1] *Hermann Hosp. v. MEBA Med. & Benefits Plan,* 845 F.2d 1286, 1288-89 (5th Cir. 1988) (analyzing ERISA standing as a question of subject matter jurisdiction); *accord Ward v. Alternative Health Delivery Sys., Inc.*, 261 F.3d 624, 627 (6th Cir. 2001) (finding that lack of standing warrants dismissal for lack of subject matter jurisdiction).

for inclusion in one of the three jurisdictional classes of ERISA litigants is uncertain from Cobb's complaint, she claims in her appellate brief and supplemental briefing that she is a "beneficiary" to whom the plan trustees owed a fiduciary duty.[2]

ERISA defines "beneficiary" as "a person *designated* by a participant, or by the terms of any employee benefit plan, who is or may become entitled to a benefit thereunder." ERISA § 3(8), 29 U.S.C. § 1002(8) (emphasis added). In favor of jurisdiction, the parties cite a case that involved the definition of "participant," *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 117-18 (1989), which held that "to establish that he or she *'may become eligible' for benefits,* a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Id.* (emphasis added). The parties explain that given that the definition of beneficiary, like the definition of participant,

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[2] Cobb has never purported to be, a "participant," or "fiduciary" as defined by ERISA; nor can she qualify within those two categories. Section 3(7) of ERISA, 29 U.S.C. § 1002(7), defines "participant" as any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit. Section 3(21) of ERISA, 29 U.S.C. 1002(21), defines "fiduciary" as a person who (i) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) has any discretionary authority or discretionary responsibility in the administration of such plan.

involves the term "is or may become entitled to a benefit," Cobb has standing because she has a "colorable claim" that she may be entitled to benefits. We disagree.

This case involves the definition of "beneficiary," not "participant." Although both require "colorable" entitlement to benefits, the definition of beneficiary additionally requires something that the definition of participant does not: that the "beneficiary" be "designated" as such by the participant or by the terms of the plan.[3] Post-*Firestone,* this court has continued to adhere to a "literal construction" of the three classes of plaintiffs with standing, and we have refused to read the "designation" requirement out of the statutory definition: A beneficiary must prove both a "colorable claim" under *Firestone* and a "designation" by the participant or the terms of the plan: A beneficiary is "a person *designated* by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8) (emphasis added).

In *Coleman* we held that a pension plan participant's son, who was his descendant, heir at law, and the representative of his estate, was not a "beneficiary" of the plan with standing to sue under ERISA because (1) the participant never designated the son to receive benefits under the plan, and (2) the terms of the plan, which directed the

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[3] Section 1002(7) defines "participant" as any "employee or former employee . . . *who is or may become eligible to receive . . . employee benefit*[s]" (emphasis added). Section 1002(8) defines "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, *who is or may become entitled to a benefit* thereunder" (emphasis added). "Therefore, based on the statutory language, a 'beneficiary' is not anyone who claims to be one. . . . [but] is one who has a reasonable or colorable claim to benefits." *Crawford v. Roane,* 53 F.3d 750, 754 (6th Cir. 1995).

Trustees to designate a beneficiary from the group of the decedent's spouse, descendants, heirs at law, and representatives of the estate, if there were any benefits "payable," could not designate a beneficiary, because there were no benefits payable (The participant received benefits under the "Lifetime Only" option, as here.):

> Charlie Coleman elected to remain under the normal Lifetime Only Income payment option. While this Plan option provides the greatest amount of monthly income, the Plan states clearly that, under this option, at the time of the participant's death, all pension benefits cease.
>
> Because no pension benefits were payable at the time of Charlie Coleman's death, the Retirement Committee was not, and is not now, authorized to name a beneficiary from the list in Section 4.2. As such, the terms of Plan Section 4.2 do not afford Coleman beneficiary status as contemplated in § 1132. Coupled with the fact that Charlie Coleman did not name his son as his beneficiary, this conclusion forecloses any statutory basis for Coleman's assertion of standing.

Coleman, 992 F.2d at 533-34.

Under this precedent, Cobb is not a beneficiary. Gibbs never personally "designated [Cobb] or anyone else as beneficiary of his Plan assets." *Id.* at 533. "[T]herefore, [Cobb's] assertion of beneficiary status rests upon the language and terms contained in the Plan." *Id.*

In its letter brief, Central States admits that the plan does not define the term "beneficiary." In her letter brief, Cobb also acknowledges that the plan does not specifically define the surviving spouse as the beneficiary. She argues, however, that because the plan allows for benefits to be

paid to surviving spouses of individuals receiving benefits under the JSO plan, she is or may become entitled to a benefit under the plan, which makes her a beneficiary. Again, the fact that Cobb is or may become entitled to a benefit does not necessarily prove the separate requirement that she be "designated" as a beneficiary by the terms of the plan.

Assuming, *arguendo,* that entitlement to benefits under the JSO would count as a "designation," Cobb's claim fails for the same reason that the son's claim failed in *Coleman* – the plan plainly provides that if the decedent received the lifetime-only benefit, the spouse is *not entitled* to a JSO benefit after his death. The plan section on "Pre-Retirement and Post-Retirement Benefit to Spouse" explains that

> [a] Joint and Survivor Pension Benefit (subject to the election and rejection provisions in "Appendix A" of this Plan) shall be payable to a Pensioner upon Retirement (commencing upon his 55th birthday), or the surviving spouse of a Participant upon his death on or after his 55th birthday but before his Retirement, if the Participant was then eligible for immediate payment of a pension benefit in accordance with Article IV, § 2, 3 or 4. Upon death of a Pensioner receiving *this* pension benefit, 50% thereof becomes payable to his surviving spouse. . . .

That is, if the plan participant dies after age 55 but before retirement, the spouse is eligible for a "pre-retirement" benefit if the pensioner was eligible to receive a pension at the time of death. If the plan participant dies after retirement, the spouse is eligible for a "post-retirement" benefit only if the Pensioner was receiving

"this" pension benefit, that is, the reduced joint and survivor benefit, not the Lifetime Benefit.

Gibbs did not die before retirement, so only the post-retirement provision could apply here. But Cobb is not "entitled" to any benefit under it, because she does not satisfy one of the eligibility criteria for it: Gibbs was not receiving "this" benefit (*i.e.* the joint and survivor benefit); he was receiving the lifetime-only benefit.[4]

Therefore, as was the case with the son in *Coleman,* the terms of the plan do not afford Cobb beneficiary status. Under the plan, no pension benefits are to be paid to surviving spouses of those who received benefits under the unreduced Lifetime Benefit option.[5]

Although it may not be advisable to interpret the terms of the plan at this jurisdictional stage, we are bound to do so by *Coleman,* which interpreted the term "payable" under the plan to determine whether the descendant and heir of the plan participant qualified as a beneficiary. Further, the definition of "beneficiary" directs the courts to look to the terms of the plan at the jurisdictional stage to decide whether the terms "designate" a plaintiff as a

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[4] *See also* section 17 ("If you die *while receiving* a Joint and Survivor Pension Benefit, your spouse will receive one-half of your pension for the rest of his or her life. . . .") (emphasis added).

[5] This case is also similar to *Lerra v. Monsanto Co.,* 521 F. Supp. 1257 (D. Mass. 1981), in which the widow of a former plan participant alleged that the defendant had failed to disclose sufficient benefit information to the decedent at the time he made his election to receive pension benefits as a "single life annuity." The court held that it lacked jurisdiction because plaintiff, never having been designated as a joint annuitant, was not a "beneficiary" and thus lacked standing to sue under ERISA.

beneficiary or whether they provide plaintiff with a colorable claim for benefits.[6]

We are aware that in *Sladek v. Bell System Management Pension Plan,* 880 F.2d 972, 976-78 (7th Cir. 1989), which was decided before *Coleman,* the court gave the term "beneficiary" a broader reading than the "literal construction" we provided in *Coleman. See id.* at 976 (noting that "it is not proper for us to give an unduly cramped reading to those provisions granting standing to certain classes of persons under the Act, i.e., participants, beneficiaries, and fiduciaries. . . . [T]his Court has consistently given the definition of 'fiduciary' found in § 1002(9) a 'broad reading' "). *Sladek* relied *inter alia* on the "zone of interest" analysis that we rejected in *Coleman.*

Furthermore, *Sladek* is distinguishable because there the benefit plan itself designated plaintiff, the deceased participant's spouse, as survivor annuitant, unless the participant elected to receive an unreduced lifetime-only benefit. Although in *Sladek* the participant elected to receive the lifetime-only benefit, the surviving spouse argued that the election was voidable because the participant was incompetent to make a decision because of Alzheimer's Disease. In contrast, here, Gibbs's *de facto* election of the Lifetime Benefit[7] is not voidable even if he

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[6] *See, e.g., Crawford,* 53 F.3d at 755 (interpreting a plan provision providing that "a spouse of a married participant must consent to any beneficiary designation which does not name the spouse as a sole beneficiary of the participant's death benefit" as not providing a colorable claim to beneficiary status (and standing) to participant's children, where the spouse did not consent to a beneficiary other than her to be named as a beneficiary).

[7] The Plan documents explain that when an application for retirement benefits is made, an election form will be mailed to those

(Continued on following page)

misrepresented that his wife was deceased.[8] Because Gibbs retired in 1978, he was entitled to select the Lifetime Benefit without the consent of his spouse.[9] Therefore, his harmless misrepresentation does not render his election voidable.

Cobb also argues in her letter brief that alternatively, she has standing under the "but for" analysis in *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209 (5th Cir. 1992). We rejected that argument in the analogous situation we faced in *Coleman,* where we explained that

> *Christopher* clearly poses a different scenario than [*sic*] the one we face today. In *Christopher,* this court restored ERISA standing to individuals who

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eligible for the JSO. Because Gibbs declared under oath that his wife was deceased, he was not eligible for the JSO, which requires that the participant be married – that is, that the spouse be alive – at the time the JSO eligibility is determined.

It would have been pointless for the Plan to send Gibbs an election form as Cobb suggests: what was there to elect? Accordingly, the default provision, that in the absence of an election of the "Lifetime Benefit," the pension will be paid as a "Joint and Survivor Benefit," is inapplicable; it applies only if an employee is entitled to the JSO. Therefore, by declaring that his wife was deceased, Gibbs rendered himself eligible for only the Lifetime Benefit.

[8] It is uncertain whether Gibbs did make a misrepresentation. Cobb has not proved that Gibbs made a knowing misrepresentation, namely that he knew that his estranged wife was still alive.

[9] Before 1984, the spouse of a participant was not required to join in an JSO election. *Boggs v. Boggs,* 520 U.S. 833, 843 (1997). "It was not until August 23, 1984, to be effective January 1, 1985, that congress amended 29 U.S.C. § 1055 to require pension plans to offer joint and survivor annuities unless otherwise elected by the participant and his spouse." *Williams v. Wright,* 783 F. Supp. 1392, 1400-01 (S.D. Ga. 1992) (citing Retirement Equity Act of 1984, P.L. 98-397, Title I, Section 103(a), 98 Stat. 1429). The amended act does not apply to Cobb, "because it did not take effect until January 1, 1985." *Id.*

> had standing but were divested of that standing through the ERISA violations of their employer. The employees alleged that they had been wrongfully induced to retire, and but for the ERISA violation, would have continued their employment and plan participation, thereby retaining status to sue under ERISA.
>
> In the present case, *Coleman* never had standing to sue under ERISA since he was neither a Plan participant nor a beneficiary. Thus, even if the Coleman's allegations of ERISA improprieties were true, those violations could not be said to have divested him of his status to sue. As such, *Christopher* does not help the appellant.

Coleman, 992 F.2d at 535.

The instant case is similar to *Coleman* in that Cobb was never a plan participant or a beneficiary, because Gibbs never received the JSO post-retirement, but only a Lifetime Benefit, which did not entitle Cobb to benefits after Gibbs' death. Because Gibbs could select the Lifetime Benefit without the consent of his wife, there is no pre-existing standing that Cobb had and of which Gibbs' misrepresentation divested her.

Nor was there a duty for Central States to correct Gibbs's misrepresentation about his wife's death once it learned about it in 1981. The plan's terms provide that in case of a misrepresentation, Central States "may" recover any benefit payments that Gibbs was not entitled to receive, not that the Central States "will" or "must" recover such benefits. Also, as explained, Gibbs was entitled to receive the Lifetime Benefit without the consent of his spouse, so Central States had no right to

recover the excess Lifetime Benefit payments from him to keep them in trust for his wife.

Last, there was no duty owed by Central States to Cobb as a "beneficiary" to insure that Gibbs submitted adequate documentation of his marital status. Before 1985 Gibbs had the right to elect the Lifetime Benefit without the consent of his spouse. Therefore, any documentation burden Central States would have imposed, in addition to the application signed under oath by Gibbs, would not have protected Cobb against the harm of which she complains – that Gibbs did not intend her to receive a survivor benefit. Although Congress enacted legislation in 1984 to protect spouses like Cobb of this harm, unfortunately for her, as we have explained, that legislation does not apply retroactively to this case.

In summary, the district court lacked subject matter jurisdiction. The judgment, accordingly, is VACATED, and this matter is REMANDED with instruction to dismiss the complaint for want of jurisdiction.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAISY ESTELLE COBB, widow of Oliver Ray Gibbs	CIVIL ACTION
VERSUS	NO. 04-1421
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION PLAN	SECTION "J"

JUDGMENT

Considering the court's reasons and ruling rendered in open court on July 20, 2005,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Central States, Southeast and Southwest Areas Pension Plan, and against plaintiff, Daisy Estelle Cobb, widow of Oliver Ray Gibbs, dismissing the plaintiff's suit with prejudice, at plaintiff's cost.

New Orleans, Louisiana, this 20th day of JULY, 2005.

/s/ Carl J. Barbier
UNITED STATES
DISTRICT JUDGE

No. 06-699

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DAISY ESTELLE COBB,
Widow of OLIVER RAY GIBBS,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit correctly held that for purposes of bringing suit as a "beneficiary" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a), an individual must prove both: (i) a colorable claim for benefits; and (ii) that he was designated as such by a participant or by the terms of an employee benefit plan.

PARTIES TO THE PROCEEDING

Petitioner

Daisy Estelle Cobb ("Ms. Cobb") is the widow of Oliver Ray Gibbs. Prior to his death, Mr. Gibbs was a retired participant of the Central States, Southeast and Southwest Areas Pension Fund.

Respondent

Central States, Southeast and Southwest Areas Pension Fund ("Central States") is a multiemployer pension plan as defined by ERISA, 29 U.S.C. §§ 1002(2)(A) and 1002(37).

CORPORATE DISCLOSURE STATEMENT

Central States does not have a parent corporation and no public company owns stock in Central States.

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IN THE

Supreme Court of the United States

No. 06-699

DAISY ESTELLE COBB,
Widow of OLIVER RAY GIBBS,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PERTINENT STATUTES

29 U.S.C §§ 1002(7) & (8) provide as follows:

For purposes of this subchapter:

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

> (8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

29 U.S.C. § 1132(a) provides, in pertinent part, as follows:

> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

STATEMENT OF THE CASE

A. The Trustees' Denial Of Ms. Cobb's Claim.

Oliver Ray Gibbs ("Mr. Gibbs") was a participant of Central States. In August of 1979, Mr. Gibbs submitted an Application For A Retirement Pension Benefit (the "Pension Application") to Central States stating that he was retiring on October 26, 1979. (RE 34-35; RE 9, ¶¶ 24 & 25 [R. 166, ¶¶ 24 & 25].)[1] At the time he submitted his application, Mr. Gibbs was married to, but separated for 13 years from, Ms. Cobb. (RE 32; RE 8, ¶ 22 [R. 165, ¶ 22].) Although Ms. Cobb was still alive, Mr. Gibbs represented under oath that his spouse was "deceased" in his Pension Application. (RE 34-35; RE 9, ¶¶ 25 & 26 [R. 166, ¶¶ 25 & 26].)

When he retired, Mr. Gibbs was eligible to receive an unreduced pension of $675.00 per month for the rest of his

---

[1] "RE __" refers to Appellee's Record Excerpts and "R. __" refers to the "USCA5 __" pagination used for the record on appeal in the Fifth Circuit.

life. (RE 33, 25 & 24; RE 9-10, ¶¶ 28-30 [R. 166-67, ¶¶ 28-30].) Central States' Pension Plan also allowed an eligible participant to receive or reject the Joint and Survivor Pension Benefit (hereinafter referred to as the "JSO"). (RE 17 & 21; RE 4, ¶ 16 [R. 161, ¶ 16].) Generally, this benefit provides a reduced pension to the participant, and 50% of the reduced lifetime pension as a lifetime monthly income to his/her spouse after the participant's death. (RE 18; RE 4-5, ¶ 17 [R. 161-62, ¶ 17].) In Mr. Gibbs' case, if the JSO had been elected, he would have received a reduced lifetime pension of $588.60 per month, instead of his full pension of $675.00 per month. (RE 24; RE 10, ¶ 30 [R. 167, ¶ 30].) By representing that his spouse was "deceased," Mr. Gibbs became ineligible for the JSO and effectively rejected the benefit.[2]

After Mr. Gibbs' application was processed by Central States, he received a letter advising that his Pension Application had been approved. (RE 33; RE 9, ¶ 28 [R. 166, ¶ 28].) The letter advised that he would receive a pension benefit of $675.00 per month effective November 1, 1979. (RE 33; RE 9, ¶ 28 [R. 166, ¶ 28].) The letter also indicated that in the event of his death, no JSO would be paid to his spouse. (RE 33; RE 9, ¶ 28 [R. 166, ¶ 28].) Thereafter, Mr. Gibbs began to receive an unreduced pension of $675.00 per month from November of 1979. (RE 25; RE 10, ¶ 29 [R. 167, ¶ 29].) Mr. Gibbs died from lung cancer on October 31, 1985, and his pension benefits ended at that time. (RE 25 & 29; RE 10, ¶¶ 29 & 31 [R. 167, ¶¶ 29 & 31].)

In February of 1981 (prior to Mr. Gibbs' death), Ms. Cobb contacted Central States via a letter. In the letter, Ms. Cobb advised (contrary to Mr. Gibbs' sworn declaration) that she was Mr. Gibbs' spouse. (RE 32; RE 10, ¶ 32 [R. 167, ¶ 32].)

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[2] It is unclear why Mr. Gibbs represented that his spouse was deceased. The law, at that time, gave him sole discretion to accept or reject the JSO. *Boggs v. Boggs*, 520 U.S. 833, 843, 117 S.Ct. 1754 (1997).

Ms. Cobb stated that she and Mr. Gibbs had been separated for "about 15 years" but that they were still legally married. (RE 32; RE 10, ¶ 32 [R. 167, ¶ 32].) Ms. Cobb also stated that Mr. Gibbs was receiving a pension benefit and that she wanted to receive some of the pension benefits because "I won't [sic] what is mine." (RE 32; RE 10, ¶ 32 [R. 167, ¶ 32].) Central States responded to that letter by advising Ms. Cobb that she was not eligible to receive any part of Mr. Gibbs' pension benefit because the Pension Plan provided that "[a]ll Pension Benefits provided by this Plan shall be paid directly to the Pensioner, and not to any creditor or other person not eligible for such benefits." (RE 31; RE 10, ¶ 33 [R. 167, ¶ 33].)

In 2002, nearly 17 years after Mr. Gibbs' death, and about 21 years after Ms. Cobb first raised the issue with Central States, Ms. Cobb, through her attorney, requested benefits from Central States as a result of Mr. Gibbs' death by submitting an Application For Death Benefit. (RE 30; RE 10-11, ¶ 34 [R. 167-68, ¶ 34].) In a letter dated September 6, 2002, Central States advised Ms. Cobb that she was not eligible to receive any benefits because Mr. Gibbs did not elect the JSO when he retired in 1979. (RE 11, ¶ 35 [R. 168, ¶ 35].)

Pursuant to Central States' appeals process, Ms. Cobb appealed the denial of her claim. Ms. Cobb exhausted her administrative appeals by taking her claim before Central States' Board of Trustees. On December 9, 2003, the Trustees reviewed all of the information contained in the administrative record and rejected Ms. Cobb's appeal. The Trustees determined that "the communications, acts and omissions by the late Oliver Ray Gibbs, at and around the time of his 1978 [sic] retirement, induced the Pension Fund to rely, and the Pension Fund did in fact actually and reasonably rely, upon his intention to reject the JSO." (RE 27; RE 11-12, ¶ 39 [R. 168-69, ¶ 39].)

B. The District Court Held That The Trustees' Decision Was Reasonable.

On May 18, 2004, Ms. Cobb filed suit in the Eastern District of Louisiana under ERISA, 29 U.S.C. § 1132(a)(1)(B), seeking to overturn the denial of her claim. Although Ms. Cobb presented numerous arguments in the District Court, her main arguments were: (i) since Mr. Gibbs never signed an election form rejecting the JSO, she was entitled to the JSO under the terms of the Pension Plan; and (ii) Central States was obligated to unilaterally reduce Mr. Gibbs' pension to provide for the JSO once it discovered that Ms. Cobb was still alive.

The District Court reviewed the Pension Plan and Central States' Trust Agreement and held that the documents conferred the Trustees with discretionary authority to determine eligibility of benefits. Accordingly, the District Court reviewed the Trustees' denial of Ms. Cobb's claim under the abuse of discretion standard. After reviewing the administrative record and the terms of the Pension Plan, the District Court concluded that Ms. Cobb was not entitled to the JSO. Specifically, the Court held that there was "no doubt" that Mr. Gibbs "did not want to give his wife any survivor's benefit." (RE 39 [R. 387].) After rejecting Ms. Cobb's remaining arguments, the District Court upheld the Trustees' decision, entered summary judgment for Central States, and entered judgment dismissing the complaint and the action asserted thereby.

C. The Fifth Circuit Held That There Was No Subject-Matter Jurisdiction And Vacated The District Court's Decision.

Ms. Cobb appealed the District Court's decision to the Fifth Circuit and presented the same main arguments. The court addressed jurisdiction first and noted that it was required to interpret the terms of the Pension Plan at the "jurisdictional stage" to judge the issue of Ms. Cobb's

standing, *i.e.*, whether she met the definition of "beneficiary." *Cobb v. Central States, S.E. & S.W. Areas Pension Fund*, 461 F.3d 632, 637 (5th Cir. 2006).The Fifth Circuit then proceeded to review the Pension Plan and administrative record and concluded that Mr. Gibbs had rendered himself ineligible for the JSO by representing that his spouse was deceased. *Id.* at 638 n.7. Moreover, the Fifth Circuit determined that Mr. Gibbs had rejected the JSO *de facto* and that even if he misrepresented that his wife was deceased, it was harmless because he was entitled to reject the JSO without the consent of his spouse. *Id.* at 638. Despite concluding that Ms. Cobb was not entitled to the JSO, the Fifth Circuit decided to vacate the District Court's decision due to a lack of subject-matter jurisdiction. The court held that Ms. Cobb did not have standing to sue as a "beneficiary" under § 1132(a), because she was never designated by Mr. Gibbs, or the terms of the plan, to receive benefits.[3] Accordingly, the Fifth Circuit remanded the matter with instructions to dismiss the complaint for want of subject-matter jurisdiction.

REASONS FOR DENYING THE PETITION

A. There Is No Compelling Reason To Grant Ms. Cobb's Petition.

Ever since this Court's decision in *Lau Ow Bew*, 141 U.S. 583, 12 S.Ct. 43 (1891), this Court has exercised great restraint in granting certiorari. The power has been sparingly used and reserved for cases of "peculiar gravity and general importance" or "to secure uniformity of decision." *American Const. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 383, 13 S.Ct. 758 (1893). Ms. Cobb's case satisfies neither requirement and satisfies none of the "compelling reasons"

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[3] All statutory citations contained in this brief refer to "29 U.S.C. § ___" unless indicated otherwise.

listed in Supreme Court Rule 10. There is no conflict between the circuit courts on any issue raised by Ms. Cobb. Moreover, no important federal question was decided in a way which conflicts with decisions from this Court.

Ms. Cobb's case turned on the Fifth Circuit's application of the individual facts involved to a statement of the law that is consistent with the plain text of ERISA and decisions of other circuit courts. Accordingly, it is unlikely that the Fifth Circuit's decision will have a lasting impact on anyone other than Ms. Cobb. Admittedly, the case, like any other case, is important to the individual involved. However, that is not a compelling reason to grant certiorari. Granting Ms. Cobb's petition will not "secure uniformity of decision" since there is no split of authority among the circuit courts regarding the issue involved and no important question of federal law has been decided by the Fifth Circuit which conflicts with decisions from this Court. Accordingly, Ms. Cobb's petition should be denied.

B. Determining Whether Ms. Cobb Proved That Mr. Gibbs Misrepresented His Marital Status Is Not Grounds For Granting Certiorari.

In the proceedings below, Ms. Cobb argued that Central States should have unilaterally reduced Ms. Gibbs' pension and forced him to take the JSO benefit because he misrepresented that his wife was deceased. In addressing this argument, the Fifth Circuit, in a footnote, stated that Ms. Cobb had failed to prove that Mr. Gibbs had made a knowing misrepresentation. *Cobb*, 461 F.3d at 638 n.8. Relying solely on this statement, Ms. Cobb argues that the court failed to review the entire record and therefore requests review. However, the Fifth Circuit's observation, whether correct or not, was completely irrelevant to the court's decision.

The basis of the Fifth Circuit's decision was the lack of subject-matter jurisdiction. Although the court touched upon

the merits of the case in ruling on jurisdiction, a determination of whether Mr. Gibbs had knowingly misrepresented his marital status was unimportant to the court's holding. Indeed, for purposes of addressing Ms. Cobb's argument, the Fifth Circuit gave her the benefit of the doubt and assumed that Mr. Gibbs *had* knowingly misrepresented that his wife was deceased. *Id.* at 638. However, as stated by the court, his misrepresentation was "harmless" because, at that time, the law allowed Mr. Gibbs to select an unreduced pension without the consent of his spouse. *Id.* at 638. Thus, determining whether Ms. Cobb proved that Mr. Gibbs misrepresented his martial status is not grounds for granting certiorari.

C. The Fifth Circuit's Decision Is Consistent With The Plain Text Of ERISA And The Decisions Of The Ninth, Third, and Seventh Circuits.

The Fifth Circuit held that to maintain a suit as a "beneficiary" under § 1132(a), an individual must prove both: (i) a colorable claim for benefits; and (ii) that he was designated as such by a participant or by the terms of an employee benefit plan. *Cobb*, 461 F.3d at 636. In her Petition, Ms. Cobb takes issue with the latter requirement and argues that by requiring a "designation," the Fifth Circuit's decision conflicts with those of the Ninth, Third, and Seventh Circuits. Ms. Cobb is wrong.

Since ERISA provides a definition of the term "beneficiary," the first place to look is the text of the statute. *U.S. v. Alvarez-Sanchez*, 511 U.S. 350, 356, 114 S.Ct. 1599 (1994). ERISA defines "beneficiary" as "a person *designated* by a participant, or by the terms of any employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8) (emphasis added). Thus, the Fifth Circuit's "designation" requirement is clearly consistent with the plain text of ERISA.

Ms. Cobb argues that the Fifth Circuit's decision conflicts with the Ninth Circuit. Although her Petition fails to state which cases conflict, Ms. Cobb seems to be arguing that *Cobb* conflicts with *Fentron Indus., Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300 (9th Cir. 1982). In *Fentron*, the Ninth Circuit addressed whether an employer had standing to sue under § 1132. Although the court noted that "employers" were not one of the groups empowered to sue under § 1132, it held that section's list of potential plaintiffs was not exclusive. *Id.* at 1305. The court then held that Fentron (an employer) had standing to sue because its alleged injuries fell within the "zone of interests" protected by ERISA. *Id.* at 1304-05.

It is questionable whether *Fentron* remains good law. Indeed, the Ninth Circuit itself has admitted that the "[t]he reasoning of *Fentron* has twice been repudiated by the Supreme Court" and that the case "has also been uniformly rejected by other circuits and by commentators." *Cripps v. Life Ins. Co. of North America*, 980 F.2d 1261, 1265, n.3 (9th Cir. 1992)(citations omitted). Moreover, cases post-*Fentron* clearly show that the Fifth Circuit's decision in *Cobb* is in-line with the Ninth Circuit. For example, in *Harper v. American Chambers Life Ins. Co.*, 898 F.2d 1432 (9th Cir. 1990), the court considered whether plaintiffs had standing to sue as beneficiaries under § 1132(a). As the Fifth Circuit did in *Cobb*, the Ninth Circuit looked to the definition contained in § 1002(8) and analyzed whether plaintiffs had been "designated" as beneficiaries. *See also Peterson v. American Life & Health Ins. Co.*, 48 F.3d 404, 408 (9th Cir. 1995)(holding that to be a beneficiary, an individual must be designated by a participant or the terms of the plan), *cert. denied*, 516 U.S. 942, 116 S.Ct. 377 (1995); *Curtis v. Nevada Bonding Corp.*, 53 F.3d 1023, 1027 n.2 (9th Cir. 1995)(noting designation requirement in determining beneficiary status).

Ms. Cobb also argues that *Cobb* conflicts with case law from the Third Circuit. Although Ms. Cobb's Petition again fails to state which cases conflict, she is presumably relying on the Third Circuit's decision in *Northeast Department ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147 (3d Cir. 1985).[4] In *ILGWU*, the Third Circuit addressed whether certain plaintiffs had standing to sue under § 1132(a). In the opinion, the court referred to *Fentron* for its "zone of interests" analysis. However, in the end, the Third Circuit rejected *Fentron* and elected to read § 1132(a) "narrowly and literally." *Id.* at 153. Accordingly, rather than supporting Ms. Cobb's Petition, *ILGWU* actually supports the denial of her Petition. Additionally, cases decided after *ILGWU* show that *Cobb* is in-line with the Third Circuit. *See, e.g., Wolk v. UNUM Life Ins. of America*, 186 F.3d 352, 356 (3d Cir. 1999)(court holding that to be a beneficiary, an individual must be designated by a participant or the terms of the plan), *cert. denied*, 528 U.S. 1076, 120 S.Ct. 792 (2000).

Ms. Cobb further argues that *Cobb* conflicts with the Seventh Circuit's decision in *Sladek v. Bell System Management Pension Plan*, 880 F.2d 972 (7th Cir. 1989). In *Sladek*, the wife of a pension plan participant filed suit as a beneficiary under § 1132(a) to set aside her husband's pension election due to his alleged incompetency. The court held that the wife had standing as a potential beneficiary even though she had not been designated as such by her husband. *Id.* at 978-79. Crucial to its holding was that the election may be voidable and that if the election was not valid due to the husband's incompetency, the wife would have been a beneficiary under the terms of the plan. *Id.* at 976-79.

As correctly noted by the Fifth Circuit in its analysis, *Sladek* is inapposite. In *Sladek*, the husband's pension

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[4] This is the only Third Circuit case cited in the Petition.

election was voidable because he was allegedly incompetent when he made the election. If the election was set aside, the terms of the plan would have designated the wife as a beneficiary. In contrast, here, Mr. Gibbs' *de facto* election (he said his wife was dead) is not voidable even if he misrepresented that Ms. Cobb was deceased because he had the right to reject the JSO without her consent. *Cobb*, 461 F.3d at 638.

Lastly, it is important to note that in its analysis, the Fifth Circuit assumed for argument's sake that Ms. Cobb *had* been "designated" as a beneficiary. *Id.* at 636. Nonetheless, under the facts of the case, the court held that Ms. Cobb's claim must still be rejected because Mr. Gibbs had received an unreduced lifetime pension and "[u]nder the plan, no pension benefits are to be paid to surviving spouses of those who received benefits under the unreduced Lifetime Benefit option." *Id.* at 637. Accordingly, in the opinion of the Fifth Circuit, even if Ms. Cobb satisfied the "designation" requirement, she would still not be entitled to the JSO. For this reason, even if Ms. Cobb had succeeded in demonstrating a palpable split among the circuit courts on the jurisdictional issue, this case would be a particularly poor vehicle for resolving that split. The issue should be resolved in the context of a case in which some realistic doubt remains as to the outcome on the merits. Here, it is clear how the Fifth Circuit would rule on the merits. Thus, given the unique circumstances of this case, the argument concerning "jurisdiction" would, as a practical matter, be moot; the ultimate outcome for Ms. Cobb would be the same even if she succeeded in achieving a remand to the Fifth Circuit.

In summary, the Fifth Circuit held that to qualify as a "beneficiary" under § 1132(a), an individual must prove both: (i) a colorable claim for benefits; and (ii) that he was designated as such by a participant or by the terms of the plan. The Fifth Circuit's decision is consistent with the plain

text of ERISA, and the decisions of the Ninth, Third, and Seventh Circuits. Accordingly, Ms. Cobb's Petition should be denied.

D. The Fifth Circuit's Decision Is Consistent With This Court's Decision In *Firestone*.

Lastly, Ms. Cobb argues that *Cobb* conflicts with this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948 (1989). In *Firestone*, this Court was asked to determine who could qualify as a "participant" for purposes of § 1132. Focusing on the fact that ERISA defined "participant" to include any individual who "may become eligible" for benefits, the Court held that the term included anyone who has a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future . . ." *Id.* at 117-18.

Although instructive, *Firestone* is not directly on point because that case involved the definition of "participant"—not "beneficiary." *Id.* at 117-18. The term "beneficiary," similar to the term "participant," includes any individual who "may become entitled" to benefits. 29 U.S.C. § 1002(8). However, as correctly noted by the Fifth Circuit, "the definition of beneficiary additionally requires something that the definition of participant does not: that the 'beneficiary' be 'designated' as such by the participant or by the terms of the plan." *Cobb*, 461 F.3d at 635. Accordingly, under *Firestone* and the plain text of § 1002(8), the Fifth Circuit correctly held that a beneficiary must prove both a colorable claim and a designation.[5]

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[5] In the Fifth Circuit, Central States assumed that Ms. Cobb satisfied the "designation" requirement because she was claiming the JSO as the spouse of a participant. Accordingly, in arguing that Ms. Cobb qualified as a beneficiary, Central States focused solely on whether Ms. Cobb had a colorable claim for benefits.

CONCLUSION

Traditionally, this Court has reserved its certiorari power for cases of "peculiar gravity and general importance" or "to secure uniformity of decision." The Fifth Circuit's decision will not have a lasting impact on anyone other than Ms. Cobb. Additionally, there is no split of authority among the circuit courts and no important federal question was wrongly decided. Respondent respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Trustees and Administrators of the Central States Pension Fund are fiduciaries. [Exhibit 3, in Doc #17, Part 2, Folder 2 of 2, CS 0477] 29 U.S.C. § 1104(a)(1)(A)(i)(ii)(B) and (D) provides in pertinent part

> that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the purpose of providing benefits to participants and their beneficiaries with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter 3 of this chapter.

Mr. Gibbs was a participant in the Central States, Southeast and Southwest Areas Pension Plan. He was married to the petitioner, Daisy Estelle Cobb Gibbs. He was over the age of 55. He had more than twenty years of service. Upon his retirement he was eligible for a JSO.

It was the duty of the Trustees as the administrators of the plan to see that the terms of the plan were complied with. 29 U.S.C. § 1104(a)(1)(A)(i)(ii)(B) and (D). ERISA imposes a fiduciary duty on plan administrators to discharge their duties in accordance with the documents and instruments governing the plan. *See McGown v. NJR Service Corporation*, 423 F.3d 241, 245 (3d Cir. 2005). When Mrs. Daisy Estelle Cobb Gibbs administratively appealed to the Board of Trustees of Central States the

Trustees determined that, "The communications, acts and omissions by the late Oliver Ray Gibbs, at and around the time of his 1978 (sic) retirement, induced the Pension Fund to rely, and the Pension Fund did, in fact, actually and reasonably rely upon his intention to reject the JSO." (RE 27; RE 11-12, ¶ 39 [R.168-69, ¶ 39].) However, footnote 2 on page 3 of Respondent's Brief in Opposition to Petition For Writ of Certiorari states, "It is unclear why Mr. Gibbs misrepresented that his spouse was deceased." The attorneys for Central States seem to be contradicting the Trustees. However, it was not the duty of the Trustees to rely on Mr. Gibbs' intention. Nor was it the duty of the Trustees to rely on their interpretation of his intention. Rather, it was the duty of the Trustees to administer the Plan in accordance with the terms of the documents and instruments governing the Plan. The fiduciaries were required to discharge their

> duties with respect to the plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims in accordance with the documents and instruments governing the plan.

29 U.S.C. § 1104(a)(1)(A)(i)(ii)(B) and (D). The Trustees totally failed their duties in this regard. The terms of the Plan clearly provided that a retiree would be required to provide proof of his marital status. [SPD Section 6(b)(ii) at Exhibit 3, in Original Attachments to Doc #21 of C.A. 04-1421 Sec. J, CS 0467] The Trustees failed to require such

proof. Since Mr. Gibbs was a participant eligible for a JSO, the terms of the Plan required that the administrators of the Plan provide him with an election form requiring that he reject the JSO and stipulating that if he failed to reject the JSO his benefit would be awarded as a JSO according to the terms of the Plan. This election form was required to be provided to Mr. Gibbs within a 90 day window upon his application for a retirement pension benefit. (Petitioner's Petitioner For Writ Of Certiorari, pages 13-14) [SPD Section 6(b)(ii) at Exhibit 3, in Original Attachments to Doc #21 of C.A. 04-1421 Sec. J, CS 0467] The administrators of the Plan failed to provide this form to Mr. Gibbs. Mr. Gibbs failed to reject the JSO. In fact, Mr. Gibbs failed to make an election of any kind. The Fifth Circuit held that Mr. Gibbs never made any election at all. Central States unilaterally awarded Mr. Gibbs a lifetime benefit. However, according to the terms of the Plan, since Mr. Gibbs was eligible for a JSO, he had to first reject the JSO before he could become eligible for a lifetime benefit. Since Mr. Gibbs failed to reject the JSO, within this window of opportunity, under the terms of the Plan Mr. Gibbs' pension benefit was required by the Plan to be awarded as a JSO.

Whether the Trust Agreement, as it read in 1979, when Mr. Gibbs retired, gave the administrators or fiduciaries discretionary authority to determine eligibility for benefits or to construe the terms of the plan was never shown in this case. The Trust Agreement, as it read, with all of its amendments up through the date of the hearing on the Motion For Summary Judgment, in the United States District Court for the Eastern District of Louisiana, was made part of the record. However, exactly how the Trust Agreement read in 1979 and whether the said Trust

Agreement gave the administrators and fiduciaries discretionary authority to determine eligibility of benefits or to construe the terms of the plan was never established. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-18 (1989) was a landmark case that established the standard of review in ERISA cases. Prior to *Firestone*, many benefit plans did not give the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the Plan.

The Fifth Circuit concluded that Mr. Gibbs rendered himself ineligible for the JSO by misrepresenting that his spouse was deceased. However, no participant who was eligible for a JSO as Mr. Gibbs was, could render himself ineligible for a JSO by misrepresenting that his spouse was deceased when, in fact, she was alive, and, when, in fact, he was eligible for a JSO. It was the duty of the Trustees to rule on whether a participant was eligible or was not eligible for a JSO. The Trustees had to determine eligibility for a JSO based upon objective criteria set forth in the Plan. These criteria were: 1) was the participant married; 2) was he 55 years of age or older; 3) did he have 20 years of service. Mr. Gibbs met all of these criteria. Therefore, he was eligible for a JSO.

The Fifth Circuit also determined that Mr. Gibbs made a de facto election of a lifetime benefit and that the de facto election was not voidable even if Mr. Gibbs misrepresented that his wife was deceased. The court stated that because Mr. Gibbs retired in 1978 (sic) he was entitled to select the lifetime benefit without the consent of his spouse because before 1984 the spouse of a participant was not required to join in a JSO election. It is true that Mr. Gibbs could elect the lifetime benefit without the consent of his spouse. However, his misrepresentation did not release him from the requirements of the Plan. Mr. Gibbs

had to comply with the terms of the Plan. The terms of the Plan required that Mr. Gibbs first reject the JSO before he could become eligible for a lifetime benefit. And, the terms of the Plan clearly provided that if Mr. Gibbs did not reject the JSO, within the 90 day window of opportunity, then, according to the terms of the Plan his benefit would be awarded as a JSO. Committing misrepresentation did not release Mr. Gibbs, or Central States, from being required to comply with the terms of the Plan.

The Fifth Circuit held that Mrs. Gibbs did not have standing to sue as a beneficiary under 29 U.S.C. § 1132(a) and held that the District Court lacked subject matter jurisdiction and, accordingly, the judgment was VACATED and this matter was REMANDED with instructions to dismiss the complaint for want of jurisdiction. The Fifth Circuit held that Mrs. Gibbs did not have standing to sue as a beneficiary under 29 U.S.C. § 1132(a) because she was never designated by Mr. Gibbs or by the terms of the Plan as being entitled to a JSO benefit.

The Fifth Circuit held "Gibbs never personally 'designated [Cobb] or anyone else as a beneficiary of his Plan assets.'" Pet. App. 7. It is true, as the Fifth Circuit found, that Mr. Gibbs never designated Mrs. Gibbs as the beneficiary of his plan assets. However, under the terms of the Plan, as shown above, Mrs. Gibbs was to be awarded a JSO in the absence of a valid election by Mr. Gibbs rejecting the JSO. As shown above, he was married, he was age 55 or older, he had more than 20 years of service and therefore was eligible for a JSO. And, under the terms of the Plan, before he could become eligible for a lifetime benefit, he was required first to reject the JSO on an election form to be provided to him by Central States, within a 90 day window. He was never provided with an election form and he never rejected the JSO. Therefore he

was not eligible for a lifetime benefit. And, under the terms of the Plan, his benefit was required to be provided to his surviving spouse in the form of a JSO.

The Fifth Circuit further held, "[T]herefore, [Cobb's] assertion of beneficiary status rests upon the language and terms contained in the Plan." Pet. App. 7. The Fifth Circuit then quotes the Plan section on Pre-Retirement Benefit and Post-Retirement to Spouse and concludes that if a plan participant dies after retirement, the spouse is eligible for a "post-retirement" benefit only if the Pensioner was receiving "this" pension benefit, that is, the reduced joint and survivor benefit, not the Lifetime benefit. The Fifth Circuit concludes that Cobb (Mrs. Gibbs) is not "entitled" to any benefit under it because she does not satisfy one of the eligibility criteria for it: "Gibbs was not receiving "this" benefit (i.e. the joint and survivor benefit); he was receiving the lifetime-only benefit." However, when the Fifth Circuit quotes the plan's section on "Pre-Retirement and Post-Retirement Benefit to Spouse" the Fifth Circuit ignores the language that provides "subject to the election and rejection provisions in "Appendix A" of this Plan." (*See* Excerpt VII, Page 36, [Plan, Appendix A(3) at Exhibit 3, in Original Attachments to Doc #21 of C.A. 04-1421 Sec. J, CS 0513].)

Mr. Gibbs met all the criteria for eligibility of a JSO under the terms of the Plan. The Plan required that he be provided with an election form and that he be required to reject the JSO. He could then elect the lifetime benefit. He did not reject the JSO and he did not elect the lifetime benefit. Therefore, according to the terms of the Plan if he did not elect to reject the JSO, the Plan required that his benefit be paid as a Joint And Survivor Pension Benefit.

APPENDIX A PROCEDURES FOR ELECTION AND REJECTION, BEFORE AND AT RETIREMENT, OF THE JOINT AND SURVIVOR PENSION BENEFIT (PRE-RETIREMENT AND POST-RETIREMENT BENEFIT TO SPOUSE)

(3) POST-RETIREMENT OPTION. . . . If the Participant does not elect in writing (at some time within said 'post retirement election period') that such benefit shall not be payable upon his subsequent death, the Joint and Survivor Pension Benefit shall be payable with respect to all pension benefit payments.

The Summary Plan Description provides on Section 6 (b)(ii) on pages 16-17 (*See* Excerpt VII, Page 27, [SPD Section 6(b)(ii) at Exhibit 3, in Original Attachments to Doc #21 of C.A. 04-1421 Sec. J, CS 0467]) as follows:

SECTION 6 HOW YOUR PENSION WILL BE PAID

(b) Joint and Survivor Pension Benefit

(ii) After Retirement Joint and Survivor Pension Benefit

IMPORTANT: If you do not take this election, the federal pension law requires that your benefit be paid as a Joint and Survivor Pension Benefit. If you want your benefit paid as a lifetime only pension, you MUST elect in writing that you reject the Joint and Survivor Pension Benefit.

PLEASE NOTE: You will be required to submit documents verifying your marital status and the identity of your spouse. The surviving spouse benefit may be paid only to the spouse identified by these documents. If you are not survived by

> that spouse, no death benefit shall be paid by this Plan.

The Fifth Circuit by finding that the fraud of the participant was a *de facto* election of the lifetime benefit that was not voidable, even though the participant misrepresented that his wife was deceased, in effect ignores the terms of the documents and instruments governing the plan and holds the Trustees, who were the fiduciaries of the Plan, free and harmless from the requirement of administering the Plan in accordance with the terms of the documents and instruments governing the Plan.

REASONS FOR GRANTING THE PETITION

A.

By granting the petition for certiorari this court can resolve the split amount the various circuits, particularly the Fifth and the Seventh Circuits, as to whether the surviving spouse of a participant, in a retirement pension plan governed by ERISA, who would normally have standing, but for the disputed alleged de facto election by the participant, continues to have standing to challenge the alleged de facto election of the participant, as a potential beneficiary within the meaning of 29 U.S.C. § 1102(8).

B.

By granting the petition for certiorari this court can require the Fifth Circuit to review de novo the entire record from the United States District Court for the Eastern District of Louisiana.

C.

By granting the petition for writ of certiorari this court can review the decision of the Fifth Circuit below. The Fifth Circuit held that *Coleman v. Champion Int'l Corp.*, 992 F.2d 530 (5th Cir. 1993) was a precedent and under this precedent Mrs. Gibbs is not a beneficiary. Thus Mrs. Gibbs does not have standing to sue and the complaint must be dismissed for want of jurisdiction. In *Coleman*, a son of a pension plan participant sought to be recognized as a beneficiary of the plan with standing to sue under ERISA. The court held in *Coleman* that the son was not a beneficiary of the Plan with standing to sue under ERISA because (1) the son was not designated to receive benefits under the Plan and (2) the terms of the Plan, which directed the Trustees to designate a beneficiary from the group of the decedent's spouse, descendants, heirs at law, and representatives of the estate, if there were any benefits "payable," could not designate a beneficiary because there were no benefits payable. (The participant received benefits under the "Lifetime Only" option, as here.) However, *Coleman* is distinguishable from the present case because in *Coleman* the petitioner was a son rather than a surviving spouse and the participant, Charlie Coleman, made a valid election to remain under the normal Lifetime Only Income payment option. In the present case, Mr. Gibbs made no election. He committed misrepresentation and the court called this a de facto election of a lifetime benefit. Furthermore, if the terms of the Plan are complied with, Mrs. Gibbs must be awarded a JSO because according to the terms of the Plan, Mr. Gibbs made no election, and he was eligible for a JSO. And, since Mr. Gibbs failed to reject the JSO under the default provisions of the Plan, his benefit must be awarded as a JSO. In *Sladek v. Bell System Management Pension Plan*, 880 F.2d 972, 976-78 (7th Cir. 1989), the court held that

"although the appellant was clearly not designated as a beneficiary by her husband, she was a beneficiary under the Plan in the absence of a valid election." That is exactly the situation in this case. Mrs. Gibbs was the beneficiary of a JSO in the absence of a valid election rejecting the JSO. As stated in *Sladek*, ERISA was not designed to protect those beneficiaries already receiving benefits, but also "putative" beneficiaries. *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 933 (7th Cir. 1989).

CONCLUSION

This court should grant a writ of certiorari and should find that the Fifth Circuit failed its duty to review de novo the entire record from the United States District Court for the Eastern District of Louisiana; further, the Fifth Circuit committed error in vacating the judgment of the United States District Court for the Eastern District of Louisiana and remanding with instruction to dismiss for want of subject matter jurisdiction; further, this court should resolve the split among the circuits as to whether the surviving spouse of a participant, in a retirement plan governed by ERISA, who would normally have standing, but for the disputed alleged de facto election by the participant, continues to have standing, to challenge the alleged de facto election of the participant, as a potential beneficiary within the meaning of 29 U.S.C. § 1002(8).

Respectfully submitted,

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